83-527
NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL MOORING & MARINE, INC., ET AL
Petitioners

versus

DEBORAH M. BERTRAND, ETC., ET AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners submit that their application for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the following question for review:

Whether the rule applied by the Fifth Circuit for determining seaman status under the Jones Act fails to consider the essential element of whether the individual worker's duties aided in the navigation of the vessel on which he was working, contrary to this Court's decision in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), and in conflict with the Third Circuit decision in *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir. 1978), *cert. denied*, 444 U.S. 833 (1979).

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LIST OF PARTIES

The following are the parties to this proceeding in the United States Court of Appeals for the Fifth Circuit:

Deborah M. Bertrand, personal representative of Emile Bertrand, III, Plaintiff-appellant

Lisa A. Bertrand, personal representative of Paul Anthony Bertrand, Plaintiff-appellant

Marilyn Emery Smith and Lawrence Emery, surviving parents of William D. Emery, Plaintiffs-appellants

Shmuel Mezan, Plaintiff-appellant

Fidelity & Casualty Company, Defendant-appellant

International Mooring & Marine, Inc., Defendant-appellee

American General Insurance Company, Defendant-appellee

Arkwright-Boston Manufacturers Mutual Insurance Company, Defendant-appellee

Pursuant to Rule 28.1, petitioners state that the parent company of International Mooring & Marine, Inc. is IMM Energies and Technology, Inc., and that the following is a list of subsidiary and affiliated companies of International Mooring & Marine, Inc.:

IMM Rayburn, Inc.

First Inmar of Louisiana

First Inmar of Texas

Second Inmar of Louisiana

No.

UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

INTERNATIONAL MOORING & MARINE, INC., ET AL
Petitioners

VERSUS

DEBORAH M. BERTRAND, ETC., ET AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana is reported at 517 F.Supp. 342 (1981). The opinion of the United States Court of Appeals for the Fifth Circuit is reported under the title *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983).

JURISDICTION

Petitioners seek a writ to the United States Court of Appeals for the Fifth Circuit to review its decision and order filed on March 17, 1983. An application for rehearing was denied by the Court of Appeals in an order entered on June 27, 1983. This court has jurisdiction pursuant to U.S.C. §1254(1).

STATUTES INVOLVED

This petition raises issues under the Jones Act, 46 U.S.C. §688, the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§901-50, and the Outer Continental Shelf Lands Act, 43 U.S.C. §1333.

This petition specifically raises issues under the following provisions of the Jones Act:

Recovery for Injury to or Death of Seaman

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U.S.C. §688

This petition raises issues under the following provisions of the United States Longshoremen's & Harbor Workers' Compensation Act:

Coverage

(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry-dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. No compensation shall be payable in respect of the disability or death of – (1) a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net. . .

33 U.S.C. §903

This petition also raises issues under the following provisions of the Outer Continental Shelf Lands Act:

Longshoremen's & Harbor Workers' Compensation Act Applicable; Definitions

(b) With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resourses, or involving rights to the natural resources, of the sub soil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's &

> Harbor Workers' Compensation Act. For the purpose of the extension of the provisions of the Longshoremen's & Harbor Workers' Compensation Act under this section – (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any state or foreign government, or of any political subdivision thereof. . .
>
> 43 U.S.C. §1333

STATEMENT OF CASE

These consolidated cases arose out of a one vehicle collision on April 14, 1979, which injured Shmuel Mezan and killed Emile Bertrand, III, Paul Bertrand, and William Emery. At the time of the accident, all four plaintiffs were employees of International Mooring & Marine, Inc. (hereafter referred to as "IMM"), and were passengers in a company van which was transporting them from Galveston, Texas, to the IMM office in New Iberia, Louisiana. Three of the employees, Shmuel Mezan, Emile Bertrand, III and William Emery, were members of an anchor handling crew which had just completed a one week job helping move a drilling barge from a location off the coast of Louisiana to a point near Galveston. The fourth employee, Paul Bertrand, had been dispatched to Galveston in a company vehicle to bring the IMM crew back to New Iberia.

Four separate suits were filed by Mezan and the personal representatives of the deceased employees against IMM and its insurers in the United States District Court

for the Western District of Louisiana, seeking damages under the Jones Act, 46 U.S.C. §688. After the various suits had been consolidated, two of the defendant insurers, American General Insurance Company and Arkwright-Boston Manufacturers Mutual Insurance Company, moved for summary judgment claiming that the plaintiffs were not seamen as a matter of law, and IMM later filed a separate motion on the same ground.

On June 19, 1981, the District Court granted the defendant insurers' motion for summary judgment, holding that plaintiffs were not Jones Act seamen because they were not permanently assigned to a specific vessel or group of vessels. On the basis of this ruling, the court later granted a similar motion by IMM. All plaintiffs appealed, and the Fifth Circuit reversed and remanded the case for further proceedings holding that reasonable persons could conclude that plaintiffs were Jones Act seamen. Rehearing and rehearing en banc were denied on June 27, 1983. IMM and two of its co-defendant insurers, American General Insurance Company and Arkwright-Boston Manufacturers Mutual Insurance Company, are now petitioning for a writ of certiorari to the Fifth Circuit to review its ruling.

Facts

IMM is an oilfield service corporation which engages in platform maintenance, fabrication, painting, sandblasting, and anchoring and mooring of offshore drilling barges and tender vessels. On April 14, 1979, the plaintiff, Shmuel Mezan, and decedents, Emile Bertrand, III, and William Emery, were employed as anchor handlers by IMM. The typical anchor handling crew consisted of a superintendent, an operator, a welder and four riggers. The crew's

work was done from vessels which were provided by IMM's customers; the anchor handling crew would work aboard whatever vessel the customer has designated. These vessels were generally offshore oil service vessels which had been made available to lessees of offshore mineral interests pursuant to long term contracts between the owners of the respective vessels and the various lessees. The vessels carried their own regular crew which consisted of a master, cook, deckhands and mechanic - - an ordinary ship's complement. Anchor handling was but one of many tasks which comprised the overall mission of such a service vessel.

The anchor handling crewmembers remained aboard the work vessel for the duration of their work assignment, which ranged from several hours to seven days, with the average job lasting four to five days. The anchor handlers were assigned to work on the vessels on a completely random basis, were on each vessel for a limited time, and were aboard each vessel for the limited purpose of performing a single task - - that of lowering or raising an anchor belonging, not to the vessel upon which they worked, but to a movable drilling barge. At the time of this accident, three of the plaintiffs were part of an anchoring handling crew that had just completed a seven-day rig relocation job for Tenneco on the Outer Continental Shelf and were returning to the IMM office; the fourth plaintiff was a standby rigger who had been sent with a company van to bring the crew back. The Tenneco job had been conducted from the AQUAMARINE 503, a service vessel chartered by Tenneco.

Prior to this particular job aboard the 503, these crewmembers had worked aboard a number of similar vessels also provided by IMM's customers. Time sheet summaries

for one of the workers, Mezan, indicate that during the eight months he was employed by IMM he worked aboard 22 different vessels, and was assigned to four vessels three times each, eight vessels twice, and the remaining ten vessels once. His work summaries also indicate that the highest percentage of time ever spent on one vessel was 11.4%, while the average time spent with each vessel was 2.6%. Similarly, the work summary of another employee, Emile Bertrand, spanning a one-year time period, shows that he was assigned to 25 different vessels, working aboard four vessels twice and all others once. The most time he spent on any single vessel, expressed as a percentage of his total vessel time, was 13.5%; however, the average time spent upon each vessel was only 3.4%. The District Court treated the work histories of these two workers as representative of all employees. From this evidence, the court found it to be an "undisputed fact" that, although the plaintiffs were regularly and continuously assigned to vessel related activity, "the work records do not substantiate patterns of regular and continuous jobs on any one vessel or specific fleet of vessels." Instead, whether or not a worker ever returned to work on a vessel previously worked upon was completely fortuitous. Apart from the anchor handling tasks performed by the workers, the only duties performed on the vessels were those of loading the vessel with their own special tools and housekeeping in their work area. The anchor handling crew performed no duties in the actual navigation of the work vessels, and they did not even go aboard the drilling rigs whose anchors they handled. Based upon the work summaries referred to above, the likelihood that any of the members of the anchor handling crew would have worked aboard the 503 again is statistically very remote and, in any event, would be totally fortuitous and beyond the control of IMM.

ARGUMENT

The Jones Act provides a cause of action for "any seaman who shall suffer personal injury in the course of his employment." 46 U.S.C. §688. The Longshoremen's and Harbor Workers' Compensation Act, on the other hand, restricts the benefits of the Jones Act to a master or a member of a crew of any vessel. The issue raised by this petition centers on whether the rule applied by the Fifth Circuit for determining the status of the plaintiff anchor handlers under the Jones Act improperly omitted consideration of whether or not the anchor handlers' duties aided in the navigation of the vessel upon which they worked, contrary to the holding in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), and in conflict with the Third Circuit decision of *Simko v. C.&C. Marine Maintenance Co.*, 594 F.2d 960 (3d Cir. 1979), *cert. den*, 444 U.S. 833 (1979).

The District Court granted summary judgment on the issue of Jones Act status in favor of defendants based upon the finding that none of the plaintiffs had a more or less permanent connection with a particular vessel or with a specific group of vessels. The District Court concluded that to be a member of the crew of numerous vessels would require that the group or fleet act together under one control or gather closely together and form a recognizable unit. In support of this conclusion of law, the Court referred to the following language in *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981), in which the Fifth Circuit made it clear that the relationship between the individual and an identifiable vessel or group of vessels must be substantial in point and time, not spasmodic:

> The key is that there must be a relationship between the claimant and a specific vessel or identifiable group of vessels.
>
> Guidry's deposition was quite explicit. His assignment to any particular structure was random. At no time was he assigned to work on a particular rig on a continuing or regular basis. See, e.g., *Stokes v. B.T. Oilfield Services, Inc.*, 617 F.2d 1205, 1207 (5th Cir. 1980); *Keener v. Transworld Drilling Co.*, 468 F.2d 729, 732 (5th Cir. 1972). Indeed, of the forty different rigs Guidry was assigned to during his career, 13 were non-vessel fixed platforms, 7 were on land, and of the remaining 20 movable rigs, he was on 13 only once and never did he return to a specific rig more than three times.

The Fifth Circuit overruled the District Court's decision, using what it referred to as the *McKie* test,[1] as modified by the so-called *Robison* test.[2] The *McKie* test provides as follows:

> The essential and decisive elements of the definition of a "member of a crew" are that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation.[3]

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[1] *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953).

[2] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[3] *McKie v. Diamond Marine Co.*, supra, p. 136.

The *Robison* test as applied by the Fifth Circuit in this case permits a factual finding of seaman status under the Jones Act:

> (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[4]

With respect to this petition, the pertinent part of the Fifth Circuit's holding appears in the following passage:

> The two criteria of *Robison* are conjunctive. *E.g., Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 328 (5th Cir. 1977). Plaintiffs satisfy the second part because the performance of the anchorhandlers' duties clearly contributed to the accomplishment of the vessel's mission, the relocation of the drilling barge.[5]

In this respect, the test applied by the Fifth Circuit and consequently the conclusion reached with respect to determining status under the Jones Act is contrary to the test applied by the Supreme Court in *Bassett, supra*, and the Third Circuit decision in *Simko, supra*.

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[4] *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 244 (5th Cir. 1983).

[5] Id., p. 246.

In *Bassett*, an employee of South Chicago Coal & Dock Company was drowned while serving his employer on a vessel in navigable waters of the United States. The issue was whether or not the deceased's widow was entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act or whether she was excluded from the benefit program because her decedent had been a member of the crew of the vessel upon which he had worked. The Court of Appeals described the worker's chief task as that of:

> . . . facilitating the flow of coal from his boat to the vessel being fueled - - removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope and releasing or making the boat fast. He performed no navigational duties. He occasionally did some cleaning of the boat. He did not work while the boat was enroute from the dock to the vessel to be fueled.[6]

The Court of Appeals also thought it significant that:

> His only duty relating to navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fuel of the vessel while both boats were at rest; that he had no duties while the boat was in motion. . .[7]

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[6] *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251, 255 (1940).

[7] Id.

In affirming the judgment of the Court of Appeals, this Court made the following comments concerning the Longshoremen's and Harbor Workers' Compensation Act:

> This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co. v. Haverty, supra*), were still regarded as distinct from members of a 'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on-board to aid in her navigation. . . These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. . .[8]

The factual parallels between *Bassett, supra*, and this case are striking. In both cases plaintiffs were aboard their respective vessels to perform a special mission unrelated to the navigational duties of the vessel from which each worked. In both cases the vessel's special mission was that of helping another vessel to which the plaintiffs were not assigned. In both cases plaintiffs performed incidental tasks of throwing the ship's line or cleaning the boat. In

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[8] Id., p. 260.

both cases plaintiffs had no duties while the vessel was underway. In both cases plaintiffs would fall under the provisions of the LHWCA if not found to be crewmembers. In neither case were the plaintiffs "naturally and primarily onboard to aid in navigation of the vessel upon which they worked."

The result in this case is different from the result in *Bassett*, because the Fifth Circuit applied a different test which conflicts with the *Bassett* test. In *Bassett*, the test applied was whether or not the employee was on the vessel naturally and primarily to aid in her navigation. In contrast, the test applied by the Fifth Circuit was whether or not "the capacity in which the employees were employed, or the duties which they performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips."

The Fifth Circuit test is substantially broader than the test applied by this Court in *Bassett* and, therefore, necessarily produces incompatible results in similar factual situations - - thereby jeopardizing the desired goal of uniformity of federal law.

Not surprisingly, the same disparity of tests and results exist between the Fifth Circuit and the Third Circuit, as evidenced by the opinion in *Simko v. C&C Marine Co.*, 594 F.2d 960 (3rd Cir. 1978), *cert. den.*, 444 U.S. 833, (1979). In *Simko* the plaintiff was hired by C&C Marine Maintenance Company as a laborer. He was assigned the job of assisting in the cleaning and minor repair of barges brought to C&C's facilities along the Ohio River by a variety of barge companies. During the course of cleaning one of the barges, Simko fell overboard and drowned.

Again, one of the issues was whether or not Simko's widow was entitled to benefits under the Longshoremen's and Harbor Worker's Compensation Act or whether she was entitled to bring a claim under the Jones Act. In finding that the evidence presented at trial was insufficient to permit the submission of the Jones Act claim to the jury the Third Circuit said the following:

> This Court has previously held that among the "decisive elements necessary of proof in determining who is 'a member of a crew' within the meaning of the Jones Act" is a requirement "that the worker be aboard the ship primarily to aid in navigation." *Griffith v. Wheeling Pittsburg Steel Corp.*, 521 F.2d 31, 36 (3rd Cir. 1975), *cert. den.*, 423 U.S. 1054, 96 S.Ct. 985, 46 L.Ed.2d 643 (1976). The estate's Jones Act claim was submitted to the jury on the theory that Simko, at the time of his death, was a member of the crew of either ACBL number 2699 or C&C's crane barge, to which number 2699 was moored. However, the evidence introduced at trial could not support a jury finding that Simko was aboard either barge primarily to aid in its navigation.
>
> Testimony introduced at trial shows that Simko was hired by C&C as a laborer and that his function was to assist in the cleaning of barges moored to C&C's crane barge. He shoveled debris from their interiors, squirted the decks with waterhoses, and helped in carrying pumps and other equipment used in the cleaning operations . . . in *Griffith* this

> Court held that a worker injured while engaged in loading a barge at a steel mill along the Ohio River had not been aboard that barge primarily to aid in its navigation, and thus we affirmed the District Court's entry of summary judgment against the plaintiff on a Jones Act claim . . . the focus applied by this Court in *Griffith* to the nature of the duties performed by the putative Jones Act claimant is consistent with the leading Supreme Court opinion in this area, *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957).[9]

The Third Circuit held that the proper test of seaman status, which Simko had not met, was whether he performed *significant navigational functions* with respect to *that vessel* on which he worked.[10]

Again the similarities between the plaintiff in *Simko* and the plaintiffs in this case are that they were both onboard vessels to perform non-navigational tasks with respect to the vessels on which they worked. The disparate results reached by the respective circuits in *Simko, supra*, and in this case, underscore the importance of petitioner's application for a writ. The Third Circuit applies a test, consistent with *Bassett*, which emphasizes the traditional notion that seamen have something to do with navigating vessels. The Fifth Circuit has applied a test here which would give such status to longshoremen or other persons who are obviously harbor workers. The Fifth Circuit test

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[9] *Simko*, supra, pp. 964-965.

[10] Id., p. 965.

distills to the simple proposition that a worker who spends a large percentage of his time aboard vessels, even though he has no particular affiliation with any single vessel or identifiable group of vessels, whose work contributes to the accomplishment of the function of those vessels, is a seaman under the Jones Act. No doubt many longshoremen spend as great a percentage of their time working aboard vessels as did these anchor handlers, and there can be no doubt that the operation of loading and unloading cargo is essential to the function of the great majority of commercial vessels operating in United States waters. There is no way to distinguish between such workers and Jones Act seamen if the test applied is the one used by the Fifth Circuit in this instance.

As this court noted in *Bassett*, Congress obviously intended to draw a line of demarcation between seamen and workers subject to the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act. The fact that these plaintiffs were performing their activities on the Outer Continental Shelf rather than in port or in a harbor does not modify that Congressional intent. In adopting the Outer Continental Shelf Lands Act, Congress specifically provided that the LHWCA should apply to injury or death of any employee resulting from operations conducted on the Outer Continental Shelf. The Fifth Circuit's decision disregards that intent and disregards the admonition in *Bassett* that the proper distinction between seamen and harbor workers (or OCS workers) be observed. By adopting the compensation regime of the LHWCA in the Lands Act, Congress has made generous provision for these plaintiffs, and it is neither necessary nor desirable to extend and expand the definition of a seaman under the Jones Act to achieve any worthwhile judicial objective.

CONCLUSION

This Court's decision in *Bassett, supra,* establishes a reasonable test for determining which maritime workers are crew members of a vessel, entitled to bring an action under the Jones Act, and which workers are covered under the Longshoremen's and Harbor Workers' Compensation Act. The decision has drawn a line of demarcation between the two statutes, making them complement rather than conflict with each other, in accordance with Congressional intent. This test is based upon whether the worker is on board a vessel "naturally and primarily in aid of navigation of that vessel." The Fifth Circuit, on the other hand, has adopted a much broader test for the Jones Act which looks at whether the capacity in which the worker was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. Consequently, this case as recently decided by the Fifth Circuit is incompatible and irreconcilable with this Court's decision in *Bassett* as well as the Third Circuit's decision in *Simko, supra*. The logical result of the Fifth Circuit's decision is to make a Jones Act seaman of virtually any maritime worker who is aboard a vessel for a significant amount of his total work time, so long as his work is not unrelated to the vessel's function. This defies the intent of Congress with respect to these two statutes and will only lead to disharmony. For these reasons, petitioners urge this Court to grant a writ of certiorari for the purpose of

conforming the disparate tests which have evolved in this area of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the bar of this Court and that three copies of the foregoing Petition for Writ of Certiorari have been served by depositing those copies in the United States mail, postage prepaid, addressed to the following parties at the addresses indicated:

Deborah M. Bertrand, through her counsel of record, David Painter, Hunt, Godwin, Painter & Roddy, Post Office Box 1743, Lake Charles, Louisiana 70602;

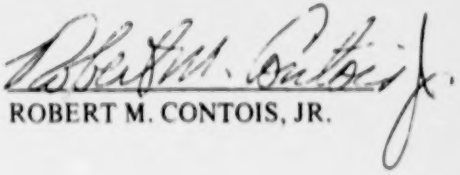
Lisa A. Bertrand, through her counsel of record, John S. Hood, Hunt, Godwin, Painter & Roddy, Post Office Box 1743, Lake Charles, Louisiana 70602;

Marilyn Emery Smith and Lawrence Emery, through their counsel of record, Richard S. Vale, Blue, Williams & Buckley, 3501 North Causeway Boulevard, Metairie, Louisiana 70002;

Shmuel Mezan, through his counsel of record, Terry G. Breaux, Connery & Breaux, Post Office Box 1026, Franklin, Louisiana 70538;

Fidelity & Casualty Company, through its counsel of record, Alfred Smith Landry, Landry, Watkins & Bonin, 211 East Main Street, Post Office Box 850, New Iberia, Louisiana 70560.

The foregoing services were made on behalf of Petitioners, International Mooring & Marine, Inc., American General Insurance Company, and Arkwright-Boston Manufacturers Mutual Insurance Company, on September 26, 1983.



ROBERT M. CONTOIS, JR.

APPENDIX A

Deborah M. BERTRAND, Etc., et al.,
Plaintiffs-Appellants,

v.

INTERNATIONAL MOORING & MARINE, INC., et al.,
Defendants-Appellees,

v.

FIDELITY & CASUALTY COMPANY,
Defendant-Appellant.

No. 81-3450.

United States Court of Appeals,
Fifth Circuit.
March 17, 1983.

Anchorhandlers, who were injured in one-vehicle accident while returning from one-week oil rig relocation job, appealed from summary judgment granted by the United States District Court for the Western District of Louisiana, John M. Shaw, J., 517 F.Supp. 342, on defendants' Motion in plaintiffs' Jones Act action. The Court of Appeals, Ingraham, Circuit Judge, held that substantial issues of material fact existed as to whether plaintiffs *were seamen* because they performed substantial portion of their work on vessels or by virtue of permanent attachment to vessels, precluding summary judgment.

Reversed and remanded.

1. Federal Courts ⇐ 595

Denial of plaintiffs' motion for summary judgment on issue of seaman status in Jones Act suit was interlocutory order and unappealable, and therefore only issue for review was whether district court erred in granting summary judgment for defendants. Jones Act, 46 U.S.C.A. §688.

2. Seamen key 29(1)
Workers' Compensation key 262

Coverage under Jones Act and coverage under Longshore's and Harbor Workers' Compensation Act are mutually exclusive. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation Act, §1 et seq., 33 U.S.C.A. §901 et seq.

3. Federal Civil Procedure key 2470.2
Seamen key 29(5.16)

Although issue of seaman status is to be left to jury in Jones Act action even when claim to such status is to be relatively marginal one, summary judgment or directed verdict by court is proper in cases in which underlying facts are undisputed and record reveals no evidence from which reasonable persons might draw conflicting inferences about such facts. Jones Act, 46 U.S.C.A. §688.

4. Seamen key 29(1)

For Jones Act purposes, one can be a member of crew of numerous vessels which have common ownership or control. Jones Act, 46 U.S.C.A. §688.

5. Seamen key 29(1)

For Jones Act purposes, one can be member of crew of numerous vessels even though employer neither owns nor

controls several vessels upon which seaman works. Jones Act, 46 U.S.C.A. §688.

6. Seamen key 29(1)

If anchorhandlers, who were injured in one-vehicle accident while returning from one-week oil rig relocation job, satisfied *Robinson* test of seaman status, Jones Act coverage would not be precluded by mere fact that employer had chartered vessels used by anchorhandlers. Jones Act, 46 U.S.C.A. §688.

7. Seamen Key 29(1)

Had employer chosen to own rather than charter vessels used by anchorhandlers, who were injured in one-vehicle accident while returning from one-week oil rig relocation job, Jones Act would cover anchorhandlers meeting *Robison* criteria of seaman status. Jones Act, 46 U.S.C.A. §688.

8. Seamen key 29(1)

In light of Jones Act purposes, employers may not deny Jones Act coverage to seamen by arrangements with third parties regarding vessel's operation or by manner in which work is assigned. Jones Act, 46 U.S.C.A. §688.

9. Seamen key 2

Although fact that claimant's work places him on several different vessels does not preclude seaman status for Jones Act purposes, it is relevant in making such determination. Jones Act, 46 U.S.C.A. §688.

10. Seamen key 2

Character and extent of worker's service aboard vessels, whether it be one or several, affects resolution of seaman status. Jones Act, 46 U.S.C.A. §688.

11. Seamen key 2

Although increase in number of vessels or decrease in period of service are not individually determinative of seaman status for Jones Act purposes, such factors should be considered, to the extent that they reveal nature and location of claimant's work, when applying *Robison* criteria for determining such status. Jones Act, 46 U.S.C.A. §688.

12. Seamen key 2

Criteria of *Robison* for determining seaman status, i. e., whether injured workman was assigned permanently to vessel or performed substantial part of work on vessel and whether capacity in which he was employed or duties which he performed contributed to function of vessel or to accomplishment of its mission or to operation or welfare of vessel in terms of maintenance during movement or during anchorage for future trips, are conjunctive. Jones Act, 46 U.S.C.A. §688.

13. Seamen key 2

Under *Robison* test of seaman status for Jones Act purposes, worker may satisfy requisite vessel relationship by demonstrating performance of substantial part of work aboard vessel or permanent assignment to vessel. Jones Act, 46 U.S.C.A. §688.

14. Seamen key 2

Although, under substantial work prong of *Robison* test

of seaman status for Jones Act purposes, percentage evidencing vessel-related work is important in determining seaman status, it is not conclusive. Jones Act, 46 U.S.C.A. §688.

15. Seamen key 2

In determining whether substantial work prong of *Robison* test of seaman status for Jones Act purposes had been satisfied, Court of Appeals had to consider all circumstances of claimants' employment to determine relation of vessel-related activities to claimants' total responsibilities. Jones Act, 46 U.S.C.A. §688.

16. Federal Civil Procedure key 2512

In anchorhandlers' Jones Act action seeking recovery for injuries suffered in one-vehicle accident while returning from one-week oil rig relocation job, genuine issues of material fact existed as to whether anchorhandlers were seamen because they performed substantial portion of their work on vessels or by virtue of permanent attachment to vessels, precluding summary judgment. Jones Act 46 U.S.C.A. §688.

17. Seamen key 2

In determining whether anchorhandlers, who were injured in one-vehicle accident while returning from one-week oil rig relocation job, satisfied permanent assignment prong of *Robison* test of seaman status for Jones Act purposes, Court of Appeals would review facts in light of factors evincing a vessel relationship that was substantial in point and time and not merely spasmodic. Jones Act, 46 U.S.C.A. § 688.

18. Seamen key 2

No particular factor is determinative of seaman status for Jones Act purposes, but, rather, each is indicative. Jones Act, 46 U.S.C.A. §688.

Appeals from the United States District Court for the Western District of Louisiana.

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

INGRAHAM, Circuit Judge.

The issue of which marine workers qualify as Jones Act seamen again surfaces before this court. Plaintiffs, who were members of an anchorhandling crew for International Mooring and Marine, Inc. (IMM), sued under the Jones Act to recover for injuries suffered in a one-vehicle accident while returning from a one-week relocation job. Both sides moved for summary judgment on the issue of seaman status. The district court denied plaintiffs' motion and granted defendants' motion. *Bertrand v. International Mooring and Marine, Inc.*, 517 F.Supp. 342, 348 (W.D.La.1981). Plaintiffs have appealed the judgment and contend that summary judgment was erroneous because the evidence supported summary judgment for plaintiffs or created a fact issue for jury determination. Concluding that the district court relied on a mistaken formulation of the legal principles governing the status determination, we reverse the judgment and remand the case for further proceedings consistent with this opinion.

On April 7, 1979, IMM dispatched an anchoring and mooring crew, which included Robert Clark as supervisor, Emile Bertrand, III, as winch operator, and Shmuel Mezan

and William Emery as riggers.[1] For this particular mission, the anchorhandling crew worked on the Aquamarine 503 and relocated Tenneco's drilling rig, the Marlin 7, from a point near Intercoastal City, Louisiana, to a point off the coast of Galveston, Texas. The Aquamarine 503[2] was chartered by Tenneco for IMM's use and was specially outfitted for lifting the heavy anchors from the ocean floor. It had sufficient deck space to stow the anchors until the rig reached its new location and the anchors reset. The IMM crew ate and slept aboard the vessel for the duration of the mission, which lasted seven days.[3] In addition to performing their anchorhandling duties, the IMM crew assisted in readying the vessel for its mission. Upon completing the Marlin 7 relocation, the IMM crew was met in Galveston by Paul Bertrand, who had been dispatched in the company van to pick up the crew. Paul Bertrand had been a standby rigger for this mission and thus had remained on call at the IMM headquarters in New Iberia, Louisiana. On the return trip the van was involved in a one-vehicle accident that killed Emile Bertrand, III, Paul Bertrand, and William Emery and injured Shmuel Mezan.

[1] The Jones Act suits[4] of Mezan and decedents' repre-

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1 Three other members of the IMM anchorhandling crew were not before the district court.

2 The vessel was accompanied by a complement crew of a master, cook, mechanic, and deckhands.

3 The work summaries indicate that the missions performed by the IMM crews, which included securing anchors loosened by bad weather and relocating drilling rigs, lasted from several hours to nineteen days, with the average job lasting four to five days.

4 The Jones Act, 46 U.S.C. §688, states:

Any seaman who shall suffer personal injury in the course of

sentatives were consolidated in the district court. Plaintiffs and defendants moved for summary judgment on the issue of seaman status. For purposes of the summary judgment motions, neither defendants nor the district court distinguished the status of Paul Bertrand from the other crew members.[5] The district court denied plaintiffs' motion, granted defendants' motion, and stated that while "this anchorhandling crew was continuously subjected to the perils of the sea like blue water seamen and was engaged in classical seaman's work, the Court finds as a matter of law that there is no reasonable evidentiary basis to support a jury finding that the injured party and the decedents involved herein were permanently assigned to any specific vessel or group of vessels and therefore, they were not seamen under the Jones Act." *Id.* at 348. Plaintiffs now appeal the judgment and assert that the decision was erron-

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4 Continued

his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

5 "[O]nce it is established that the claimant is a seaman, the Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unrelated to service of the ship." *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 432 (5th Cir. 1977), *reversed on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

eous because summary judgment was appropriate for plaintiffs or that the issue should have gone to the jury.[6]

[2] Our analysis of the issue of seaman's status necessarily begins by articulating the standards that resolve which marine workers are "seamen" or "members of a crew,"[7] since coverage under the Jones Act and the Longshoremen's and Harbor Workers' Compensation Act are mutually exclusive. *E.g., McDermott, Inc. v. Boudreaux*, 679 F.2d 452, 459 n. 7 (5th Cir. 1982); *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 280 (5th Cir. 1981). In *Ardoin*, we noted that the *McKie* test[8] "still articulates the basic com-

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6 Since the denial of plaintiffs' motion for summary judgment is an interlocutory order and is unappealable, *Fluor Ocean Services, Inc. v. Hampton*, 502 F.2d 1169 (5th Cir. 1974), the only issue for our review is whether the district court erred in granting summary judgment for defendants. *See Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 278-79 (5th Cir. 1981).

7 The term "seaman" is contained in the original Jones Act enacted in 1920. In 1927 Congress enacted the Lonshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901 *et seq.*, which extended to all maritime workers except masters or "members of a crew of [a] vessel." The Supreme Court held that the effect of the Act was to restrict the benefits of the Jones Act to "members of a crew of [a] vessel." *Swanson v. Marra Bros., Inc.*, 328 U. S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946). The terms "seaman" and "member of a crew" are now used interchangeably.

See Abshire v. Seacoast Products, Inc., 668 F.2d 832, 834 n. 1 (5th Cir. 1982); *Longmire v. Sea Drilling Corp.* 610 F.2d 1342, 1345 (5th Cir. 1980).

8 "The essential and decisive elements of the definition of a 'member of a crew' are that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation." *McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953).

pass of the term 'seaman' as used in the Jones Act." *Id.* We further noted that "the entry of summary judgment for the defendant in a Jones Act case on the ground that the plaintiff lacked seaman's status was improper and that there was an evidentiary basis to submit that question to the jury '(1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.' " *Id.* at 280-81 (citing *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) (the *Robison* test)). As we recently stated, however, "our subsequent decisions make it clear that the *Robison* test, with its broad concept of seaman's status, is to be used not only in deciding whether a case goes to the jury in a Jones Act dispute, but also in delimiting the power of the factfinder to deny or confer such status." *McDermott*, 679 F.2d at 457. Consequently, we analyze this case under the test laid down in *Robison*.[9]

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9 We never abandoned the *McKie* test, but continue to quote it or a modified version, which encompasses the second part of the *Robison* test, primarily to address cases in which the issue is whether the vessel is in navigation. *See, e.g., Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d 350, 352 (5th Cir. 1982) (modified version); *Watkins v. Pentzien, Inc.*, 660 F.2d 604, 606 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2010, 72 L.Ed.2d 467 (1982) (modified version); *Garcia v. Queen, Ltd.*, 487 F.2d 625, 628 n. 6 (5th Cir. 1973); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971); *Bodden v. Coordinated Caribbean Transport, Inc.*, 369 F.2d 273, 274 (5th Cir. 1966).

[3] Turning to the appropriateness of summary judgment on the issue of seaman status, we note that it has been described as a mixed question of law and fact, *Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 483 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed. 2d 557 (1977); *Keener v. Transworld Drilling Co.*, 468 F.2d 729, 730 (5th Cir. 1972), and as "one whose resolution requires 'the application of legal principles to specific underlying facts,' " *Ardoin*, 641 F.2d at 280 (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1345 (5th Cir. 1980)), and thus normally a question for the jury. *Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d 350, 352 (5th Cir. 1982); *Watkins v. Pentzien*, 660 F.2d 604, 606 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2010, 72 L.Ed.2d 467 (1982); *Robison*, 266 F.2d at 779-80. While "the issue is to be left to the jury even when a claim to seaman status is to be a relatively marginal one," *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157, 1162 (5th Cir. 1972), summary judgment or a directed verdict by the court is proper in cases where the underlying facts are undisputed and the record reveals no evidence from which reasonable persons might draw conflicting inferences about these facts. *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 835 (5th Cir. 1982); *Ardoin*, 641 F.2d at 280; *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 454 (5th Cir. 1980); *Landry v. Amoco Production Co.*, 595 F.2d 1070, 1072 (5th Cir. 1979); *Robison*, 266 F.2d at 779-80. Since the underlying facts are undisputed in the present case, we review them to determine whether reasonable persons might draw conflicting inferences.

[4, 5] In resolving the claim to seaman status, the district court concluded that "one cannot be a member of a crew of numerous vessels which have no common ownership or control." *Bertrand*, 517 F.Supp. at 347. Although one can

be a member of a crew of numerous vessels which have common ownership or control, *e.g., Braniff v. Jackson Avenue-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), the obverse statement, i.e., the district court's conclusion of law, is neither dictated nor supported by case law. We have never held that a seaman is barred from coverage under the Jones Act if the employer neither owns nor controls the several vessels upon which the seaman works. Instead, we have specifically held that in the context of the single vessel, the employer need not be the owner or operator of the vessel for Jones Act liability to attach. *E.g., Roberts v. Williams-McWilliams Co.*, 648 F.2d 255, 262 (5th Cir. 1981); *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d at 454; *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d at 1164-65. To require common ownership or control when seamen work on several vessels but not when they work on a single vessel is inconsistent with the liberal construction of the Jones Act that has characterized it from the beginning and is inconsistent with its purposes. *Accord Robison*, 266 F.2d at 780.

[6-8] In *Braniff*, we first examined whether to distinguish between seamen that work on a single vessel and those that work on several vessels. We stated that while "[t]he usual thing [was] for a person to have a Jones Act seaman status in relation to a particular vessel, . . . there is nothing about this expanding concept to limit it mechanically to a single ship." *Braniff*, 280 F.2d at 528. Since *Braniff*, the group of vessels concept has been used to expand coverage under the Jones Act, not restrict it.[10] "Although this anchor-handling crew was continuously sub-

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10 In *Braniff*, the claimant was responsible for maintaining not just one, but every ferry owned by his employer. We have allowed recovery under the Jones Act when the claimants were not responsible

jected to the perils of the sea like blue water seamen and was engaged in classical seaman's work, "*Bertrand*, 517 F. Supp. at 348, appellees contend that Jones Act coverage should be withheld because the vessels were not under the employer's common ownership or control. We note, however, that whether the different vessels were under common ownership or control was determined by the employer, not the nature of the claimants' work. In the present case, IMM chose to borrow the Aquamarine 503 from Tenneco, the customer whose drilling rig was being relocated. The vessel was then specifically outfitted for the mission and the customer was billed only for the services of the anchor-handling crew. On occasion, however, IMM chartered vessels directly for their own use and billed the customer for the chartered vessel as well as for the services of the anchor-handling crew. *Id.* at 344 (undisputed fact IX). Thus, if the anchorhandlers satisfied the *Robison* test, Jones Act

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10 Continued
for each and every vessel, but worked on several vessels owned by their employers. *See Abshire v. Seacoast Products, Inc.*, 668 F.2d 832 (5th Cir. 1982); *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977), *reversed on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978); *Magnolia Towing Co. v. Pace*, 378 F.2d 12 (5th Cir. 1967). Further, the fact that the employers chartered, rather than owned the vessels upon which the employees worked has not affected claimants' seamen status. *See Ardoin v. J. Ray Mc Dermott & Co.*, 641 F.2d 277 (5th Cir. 1981); *Bazile v. Bisso Marine Co.*, 606 F.2d 101 (5th Cir. 1979). Finally, recovery has been allowed when employees work aboard vessels that are neither owned nor operated by their employers. *See Taylor v. Packer Diving & Salvage Co.*, 342 F.Supp. 365 (E.D.La. 1971), *aff'd*, 457 F.2d 512 (5th Cir. 1972); *Williams v. Milwhite Sales Co.*, 197 F.Supp. 730 (E.D.La. 1961), *approved in Barrios v. Louisiana Construction & Materials Co.*, 465 F. 2d 1157, 1165-66 (5th Cir. 1972).

coverage would not be precluded by the mere fact that IMM had chartered the vessels used by the anchorhandlers. *See Taylor v. Packer Diving & Salvage Co.*, 342 F.Supp. 365 (E.D.La. 1971), *aff'd*, 457 F.2d 512 (1972). Moreover, had IMM chosen to own rather than charter the vessels, the Jones Act clearly would cover workers meeting the *Robison* criteria. *Braniff*, 280 F.2d at 528. In light of the purpose of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned. *See Williams v. Milwhite Sales Co.*, 197 F.Supp. 730 (E.D.La. 1961), *cited with approval in Barrios v. Louisiana Construction & Materials Co.*, 465 F.2d 1157 (5th Cir. 1972).

[9-11] While the fact that a claimant's work places him on several different vessels does not preclude seaman status, it is relevant in making that determination. As we stated in *Longmire*, "[t]he issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation taken as a whole." *Longmire*, 610 F.2d at 1347. Consequently, the character and extent of a worker's service aboard vessels, whether it be one or several, affects the resolution of seaman status. We have repeatedly emphasized that "the relationship creating seaman status must be substantial in point of time and work, not merely sporadic." *Dove v. Belcher Oil Co.*, 686 F.2d 329, 333 (5th Cir. 1982). *See, e.g., Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d at 353; *Roberts* 648 F.2d at 261; *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.), *cert. denied*, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981); *Rotolo v. Halliburton Co.*, 317 F.2d 9, 13 (5th Cir.), *cert. denied*, 375 U.S. 852, 84 S.Ct. 111, 11 L.Ed.2d 79 (1963); *Braniff*, 280 F.2d at 528. As the number of vessels increases or the period of service decreases, the claimant's relationship with the vessels tends to become

more tenuous and transitory. *See Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981); *Fazio v. Lykes Bros. Steamship Co.*, 567 F.2d 301 (5th Cir. 1981). Individually, these factors are not determinative, *e.g.*, *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 237-38 (5th Cir. 1974) (temporary relationship insufficient to deny status); *Braniff*, 280 F.2d at 528 (status allowed although assigned to several vessels); however, to the extent that they reveal the nature and location of a claimant's work, they should be considered when applying the *Robison* criteria. Accordingly, we turn to the facts to decide whether reasonable persons could find that plaintiffs qualified as seamen under the *Robison* test.

[12, 13] The two criteria of *Robison* are conjunctive. *E.g.*, *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 328 (5th Cir. 1977). Plaintiffs satisfy the second part because the performance of the anchorhandlers' duties clearly contributed to the accomplishment of the vessel's mission, the relocation of the drilling barge. Thus, we turn to the first criterion, which concerns the issue of the injured workers' connection with a vessel, and note that "it offers alternative grounds for meeting the standard." *Id.* at 326. Although this aspect of the test addresses the threshold inquiry of whether the claimant has had sufficient contact with waterborne or vessel-related activities, *Landry*, 595 F.2d at 1072, we have sometimes emphasized the permanency aspect to the apparent exclusion of the substantial work prong of the standard. *See, e.g.*, *Guidry v. Continental Oil Co.*, 640 F.2d at 529 & n. 19.[11] Nevertheless, the worker may satis-

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11 Although the analysis in some cases focuses upon the claimant's failure to meet a particular prong, usually the permanency prong, the facts of the cases reveal that neither alternative was satisfied. For example, the plaintiff in *Guidry*, a casing pusher on a drilling barge,

fy the requisite vessel relationship by demonstrating the performance of a substantial part of his work aboard a vessel, *e.g., Landry*, 595 F.2d 1070, or a permanent assignment to a vessel. *E.g., Ardoin*, 641 F.2d 277.

[14-16] For a claimant to satisfy the substantial work prong of *Robison*, "it must be shown that he performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity." *Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d at 353; *Holland*, 539 F.2d at 484; *Keener*, 486 F.2d at 732. The undisputed facts reveal that the anchorhandling crew worked on twenty-five vessels and that approximately ninety per cent of the work was performed aboard the vessels. *Bertrand*, 517 F.Supp. at 344 (undisputed fact XI). *Compare Abshire*, 668 F.2d at 835 (90-95% work on 21 vessels - seaman) *and Landry*, 595 F.2d at 1073 (70% work vessel-related-seaman) *with Guidry v. Continental Oil Co.*, 640 F.2d at 529 (half of assignments on 20 vessels with work constituting 20-25% of time on vessels–not seaman) *and Keener*, 468 F.2d at 731 (20–25% of work on one vessel–not seaman). Although percentages evidencing vessel-related work is important in determining seaman status, it is not conclusive. As we noted in *Keener*, "[j]ust as there can be no precise delineation of that quantum of duties which, when performed on board a vessel, will make the employee a seaman, similarly there is no brightline test to be applied

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11 Continued
admitted in deposition that he had no permanent assignment to any particular drilling vessel or group of vessels. While we focused on the lack of a permanent attachment, the nature of his work placed him on vessels for only half of his assignments and required him to work only about twenty per cent of his time on those vessels. Consequently, this minimal vessel-related work evidences the failure of the substantial work alternative.

in determining the degree of frequency and regularity of performance which must be shown in order to claim the status." *Keener*, 468 F.2d at 731-32. Consequently, we must consider all the circumstances of claimants' employment to determine the relation of the vessel-related activities to the claimants' total responsibilities.[12] *Longmire*, 610 F.2d at 1347 n. 6. In the present case, the anchor-handling crew was regularly and continuously assigned to vessel-related activity.[13] *Bertrand*, 517 F.Supp. at 345 (undisputed fact XII). The remaining time not spent on the vessels, ten per cent, was spent "preparing equipment for [the] offshore vessel assignments." *Id.* at 344 (undisputed fact XI). Thus, plaintiffs' entire employment involved preparing to work or working from a vessel. *Compare with Guidry v. Continental Oil Co.*, 640 F.2d at 539 (half of casing pusher's assignments were upon nonvessels) *and Fazio*, 567 F.2d at 303 (some days shoregang performed no vessel-related work) *and Dugas v. Pelican Construction Co.*, 481 F.2d 773, 777 (5th Cir.), *cert. denied*, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973) (roustabout's duties included cutting grass, repairing a bridge, and land-based office work). We conclude that in light of the group of vessels concept discussed above, reasonable persons could find that plaintiffs were seamen because they performed a substantial portion of their work on vessels.

[17, 18] Moreover, reasonable persons could have con-

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12 We have often discussed this aspect in terms of whether the vessel-related work was performed with any degree of regularity or continuity. *E.g., Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d 350, 353 (5th Cir. 1982).

13 As in *Abshire*, the claimant's employer kept careful records showing to which vessel he was attached while he was performing his duties. *See Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 836 (5th Cir. 1982).

cluded that plaintiffs satisfied the permanent assignment prong of *Robison's* first criterion. As we stated in *Ardoin*, "[t]he 'permanency' requirement id, we think best understood as indicating that in order to be deemed a 'seaman' within the meaning of the Jones Act 'a claimant [must] have more than a transitory connection' with a vessel or a specific group of vessels." *Ardoin*, 641 F.2d at 281 (quoting Davis, 549 F.2d at 326). *See Mungia v. Chevron Co.*, 675 F.2d 630, 632 (5th Cir. 1982). This prong is "meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for a relatively short period of time."[14] *Porche v. Gulf Mississippi Marine Corp.*, 390 F. Supp. 624, 631 (E.D.La. 1975). Accordingly, we review the facts in light of factors evincing a vessel relationship that is substantial in point and time and not merely spasmodic. *See Dove*, 686 F.2d at 333; *Guidry v. Continental Oil Co.*, 640 F.2d at 529; *Braniff*, 280 F.2d at 528. With respect to their service upon the vessel, we initially note that the crew actually went to sea and ate and slept aboard the vessels.[15] Compare *Davis*, 549 F.2d 314 with *Stokes v.*

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14 "In short, we think that something other than the mere fact of a temporary relationship is involved in most cases which profess to deny seaman's status because of an absence of a permanent connection with the vessel." *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 238 (5th Cir. 1974).

15 We reiterate that no particular factor is determinative of seaman status, *e.g.*, *Keener v. Transworld Drilling Co.*, 468 F.2d 729, 731 (5th Cir. 1972) ("Stevedores and offshore roughnecks who do no more than sleep and eat aboard a tender fall into the [transitory, rather than permanently attached] category."); *Stokes v. B. T. Oilfield Services, Inc.*, 617 F.2d 1205, 1206 (5th Cir. 1980) (claimant went to sea, but was denied seaman status), each is indicative. *See Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 327-28 (5th Cir. 1977) (citing cases in which status was denied and the worker neither lived, ate nor slept on a vessel).

B. T. Oilfield Services, Inc., 617 F.2d 1205, 1207 (5th Cir. 1980) *and Fazio*, 567 F.2d at 303. We further note that plaintiffs' tour of duty with a vessel was for the duration of the vessel's mission. Like the situation in *Roberts*, the mission of the vessel and the plaintiff's job were coextensive; when plaintiffs finished their responsibilities, the vessel's mission was completed. *See Roberts*, 648 F.2d at 262; *Ardoin*, 641 F.2d at 281-82. This should be contrasted with the situation in which the marine worker performs a particular specialized job that contributes toward the vessel's larger mission.[16] *E.g., Guidry v. Continental Oil Co.*, 640 F.2d 523 (oil worker pushing casing for well); *Dugas*, 481 F.2d 773 (roustabout unloaded a specific number of pipe joints from a barge); *Rotolo*, 317 F.2d 9 (welder performed a single repair on a single boat). Consequently, plaintiffs' claim to seaman status is strengthened by the presence of these factors, the lack of which has proven to be "fatal stumbling blocks [to] land-based workers providing shore services to docked vessels." *Davis*, 549 F.2d at 327.

Further support for plaintiffs' claim to seaman status appears in the nature of their work. First, like the welder's work in *Ardoin*, "the nature of [claimant's] work was such that he never worked except in conjunction with one of these [vessels]." *Ardoin*, 641 F.2d at 282. *Compare Abshire*, 668 F.2d at 836 (claimant "spent his entire working time aboard ships except for those rare occasions where he was rigging or making preparation for work to be performed aboard vessels") *with Fazio*, 567 F.2d at 303 (on some days, shore crew's duties were confined solely to shore).

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16 This is not to imply that a marine worker cannot demonstrate seaman status in the latter situation, but only that his case is more persuasive when his duties continue throughout the vessel's voyage.

Second, the anchorhandlers' work from the vessels was their primary duty and not merely incidental to work on shore or a nonvessel. *Compare with Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d at 353 (work aboard vessel was no more than transitory or incidental to employment aboard the platform) *and Longmire*, 610 F.2d at 1346 ("because of the symbiotic relationship between the tender and the drilling platform, [claimant's] performance of [his primary duty concerning drilling operations on the platform] necessarily carried him on to the tender from time to time"). Third, the IMM crew aided in readying the vessel for its mission. *Compare Davis*, 549 F.2d at 328 (claimant assisted in welding cracks on vessel, worked with the crew in washing the deck, and helped load and unload the barge alongside the crew) *with Guidry v. Continental Oil Co.*, 640 F.2d at 526 n. 8 (other than his specific job duties, claimant engaged in no activities which contributed to the rig's mission). Each of these factors provide further evidence that a reasonable person could conclude that plaintiffs were seamen by virtue of a permanent attachment to the vessels.

In conclusion, the district court's view of the group of vessels concept was too restrictive. If plaintiffs demonstrate the presence of the *Robison* criteria, employers cannot prevent seamen from recovering under the Jones Act by assigning them to different vessels or by making arrangements with third parties concerning the operation or navigation of the vessels upon which they serve. Since our review of the undisputed facts in light of *Robison* and the group of vessels concept discussed above reveals that reasonable persons could conclude that plaintiffs were Jones Act seamen, the granting of summary judgment for defendants was inappropriate. Plaintiffs are entitled to a trial on the merits to establish their seaman status.

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3450

DEBORAH M. BERTRAND, ETC., ET AL.,
Plaintiffs-Appellants,

versus

INTERNATIONAL MOORING & MARINE, INC., ET AL.,
Defendants-Appellees,

versus

FIDELITY & CASUALTY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion 3/17/83, 5 Cir., 198 __, _____ F.2d ____).

Filed June 27, 1983

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition

for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NUMBER 800569
SECTION S

DEBORAH M. BERTRAND, ET AL
VS.
INTERNATIONAL MOORING & MARINE, INC.

CIVIL ACTION NUMBER 800570
SECTION S

LISA A. BERTRAND, ET AL
VS.
INTERNATIONAL MOORING & MARINE, INC.

CIVIL ACTION NUMBER 810051
SECTION S

MARILYN EMERY SMITH, ET AL
VS.
INTERNATIONAL MOORING & MARINE, INC.

CIVIL ACTION NUMBER 810079
SECTION S

SHMUEL MEZAN
VS.
INTERNATIONAL MOORING & MARINE, INC.

JUDGMENT

Filed June 19, 1981

Pursuant to the ruling on the Motions for Summary Judgment this date entered and the Court finding as a matter of law that there is no reasonable evidentiary basis to support a jury finding that the injured party and the decedents herein were permanently assigned to any specific vessel or group of vessels,

It is ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment filed herein by all plaintiffs on the issue of seaman status are hereby DENIED.

It is further ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment filed herein by defendants, American General Insurance Company and Arkwright Boston Manufacturers Mutual Insurance Company, are hereby GRANTED.

This Court has further determined that there is no just reason for delay and that this Judgment in favor of defendants, American General Insurance Company and Arkwright Boston Manufacturers Mutual Insurance Company, should be designated as a final judgment of this Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Opelousas, Louisiana, June 19, 1981.

/s/ JOHN M. SHAW
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 800569

DEBORAH M. BERTRAND, ET AL
VERSUS
INTERNATIONAL MOORING & MARINE, INC., ET AL

CIVIL ACTION NO. 800570

LISA A. BERTRAND, ET AL
VERSUS
INTERNATIONAL MOORING & MARINE, INC., ET AL

CIVIL ACTION NO. 810079

SHMUEL MEZAN
VERSUS
INTERNATIONAL MOORING & MARINE, INC., ET AL

CIVIL ACTION NO. 810051

MARILYN EMERY SMITH AND LAWRENCE SMITH
VERSUS
INTERNATIONAL MOORING & MARINE, INC., ET AL
STATE OF LOUISIANA

JUDGMENT
Filed September 25, 1981

The Motion for Summary Judgment filed by INTER-

NATIONAL MOORING AND MARINE, INC., having been duly submitted for adjudication, and the Court considering the law and the evidence to be in favor of movers, INTERNATIONAL MOORING & MARINE, INC., for the reasons considered by the Judge.

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of the defendant, INTERNATIONAL MOORING & MARINE, INC. pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

THIS 25 DAY OF SEPTEMBER 1981 at OPELOUSAS LOUISIANA.

/s/ JOHN M. SHAW
DISTRICT JUDGE

Copy Sent
DATE 9-25-81
BY RW
TO:
Landry
Conery
TaobIII
Gaudet
Contois

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NUMBER 800569
SECTION S

DEBORAH M. BERTRAND, ET AL
VS.
INTERNATIONAL MOORING & MARINE, INC.

CIVIL ACTION NUMBER 800570
SECTION S

LISA A. BERTRAND, ET AL
VS.
INTERNATIONAL MOORING & MARINE, INC.

CIVIL ACTION NUMBER 810051
SECTION S

MARILYN EMERY SMITH, ET AL
VS.
INTERNATIONAL MOORING & MARINE, INC.

CIVIL ACTION NUMBER 810079
SECTION S

SHMUEL MEZAN
VS.
INTERNATIONAL MOORING & MARINE, INC.

CORRECTED RULING ON MOTIONS FOR SUMMARY JUDGMENT

Statement of the Case

These consolidated cases arose out of a one-vehicle collision involving a Ford van operated by Robert Clark on April 14, 1979, on Louisiana Highway 82, in Cameron Parish, Louisiana, resulting in injuries to passenger, Shmuel Mezan, and the deaths of three other passengers, Emile Bertrand, III, Paul Bertrand and William Emery. Three additional crew members were passengers in the vehicle. However, no claims have been presented to this Court by them or on their behalf. All of the occupants of the vehicle were employees of International Mooring and Marine, Inc. (IMM) and except for Paul Bertrand, were members of an anchoring and mooring crew which had just completed a one-week job (April 7, 1979, to April 14, 1979) on the Aquamarine 503 (503), a special-purpose vessel that Tenneco Oil Company (Tenneco) had provided in order for IMM to relocate the drilling barge, Marlin 7, from off the coast of Louisiana, to a point near Galveston, Texas. Paul Bertrand, a rigger, on call at the IMM office in New Iberia, was dispatched to Galveston, to bring the crew back to New Iberia, Louisiana, in the company van at the completion of the job. On the return trip from Galveston, Robert Clark, the company officer in charge, replaced Paul Bertrand as driver.

All plaintiffs moved for summary judgment on the grounds that Shmuel Mezan, Emile Bertrand, III, Paul Bertrand and William Emery were seamen and members of the crew of the 503, and other vessels in a fleet owned, chartered, and/or managed or controlled by defendant, IMM. Defendants, American General Insurance Company and Arkwright Boston Manufacturers Mutual Insurance Company, have moved for

summary judgment on the grounds that Mezan, the two Bertrands and Emery, as a matter of law, were neither seamen nor members of the crew of the 503, nor any identifiable fleet or group of vessels. For the purpose of this motion, defendants are not raising any substantial difference between the status of those who worked on the 503 and Paul Bertrand, who was not a member of the anchor-handling crew on this job, but was sent by IMM to Galveston, to transport the crew to New Iberia.

Undisputed Facts

I.

On April 14, 1979, the plaintiff, Shmuel Mezan, and decedents, Emile Bertrand, III and William Emery, as well as the supervisor/driver, Robert J. Clark, were employed as anchor handlers for defendant, IMM.

II.

IMM did not own any of the vessels on which these anchor-handling crew members performed their work.*

III.

The injuries and deaths arise from a one-car collision on Louisiana Highway 82 in Cameron Parish, Louisiana, which

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***Plaintiffs claim that IMM did own vessels in that IMM created a division, INMAR, to provide supply boats for offshore drilling and production. INMAR is a separate entity from IMM but even if it weren't, the fact remains that Mezan only worked on one of the five INMAR boats on two occasions and Bertrand on only one occasion.**

occurred while these employees, in the course of their employment, were being transported by their employer, IMM, from Galveston, Texas, to IMM's office in New Iberia, Louisiana, after completing a job offshore.

IV.

IMM is an oilfield service corporation with its home in New Iberia, Louisiana, specializing in the anchoring and mooring of offshore drilling barges and tender vessels.

V.

Specially outfitted vessels are required to perform IMM's functions. This work cannot be completed without vessels equipped for lifting heavy anchors from the ocean bed onto their decks.

VI.

These crew members lived and worked aboard this vessel and similar vessels for the duration of their work assignments, which generally ranged from several hours to seven days and the average job lasted four to five days.

VII.

Crew members assisted in getting the vessels into ready condition for the particular assignment and performed all of their functions on or from the vessels provided to them.

VIII.

Prior to this particular job aboard the 503, these crew members had worked on a number of similar vessels provided

to IMM by their customers for IMM to use in conducting its anchoring and mooring operations.

IX.

On these type jobs, the vessels were generally chartered by the customers but at times, IMM acted as a broker for the customer and did, on occasion, charter vessels directly for their own use and then bill the customer for the cost.

X.

IMM's crew included an operator for the mooring winch on the vessels. The vessels generally provided their own master, cook, deckhands and mechanic - an ordinary ship's complement.

XI.

The anchor-handling crew members performed approximately ninety per cent of their work aboard vessels. The other ten per cent of their work was performed ashore in preparing equipment for their offshore vessel assignments.

XII.

The work records do not substantiate patterns of regular and continuous jobs on any one vessel or specific fleet of vessels, although these crews were regularly and continuously assigned to vessel-related activity and further, their expertise in anchor handling and mooring rendered them integral and indispensable to their employer's offshore operations.

XIII.

The 503 was not owned by IMM and had been provided by Tenneco for use by the anchoring and mooring crew. The job which had been conducted on and from the 503 had been an ordinary mooring job, wherein the crew members had loaded themselves, their equipment and their personal belongings onto the vessel to remain for the duration of this particular job assignment.

XIV.

Immediately prior to the accident, this crew had completed a seven-day relocation job for Tenneco. Tenneco had chartered the 503 for IMM's crew to use in relocating the Marlin 7 from Intracoastal City, Louisiana, to off the coast of Galveston, Texas. The 503 came with an ordinary crew and was supplemented by the seven-member IMM anchoring and mooring crew: Robert J. Clark, supervisor; Emile Bertrand, III, operator; Shmuel Mezan, rigger; and William Emery, rigger and three other members.

XV.

Paul A. Bertrand was ordinarily a rigger on this crew; however, on this particular occasion, he has remained at the New Iberia office of IMM on standby. One of the duties of standby riggers is to drive personnel to and from job sites. Therefore, when the crew arrived at Galveston, Texas, via helicopter from the 503, Paul Bertrand was dispatched from New Iberia, to transport the crew back to the New Iberia office.

XVI.

The work summaries compiled from individual time sheets and work records and submitted by counsel as attachments

to their Motions for Summary Judgment are apparently incomplete as to William Emery and Paul Bertrand. However, extensive chronological reviews have been offered on behalf of Emile Bertrand, III and Shmuel Mezan. Therefore, since the excerpts submitted on behalf of Paul Bertrand and William Emery indicate that their work patterns would be very similar to that of the other crew members and since it is clear that their work is also maritime in nature, this Court will assume that more complete documentation on these two individuals would reveal that they, too, performed above ninety per cent of their work on vessels as did Mezan and Emile Bertrand, and furthermore, that the average duration of each vessel-related job which they performed would be substantially equivalent to those of the other crew members.*

XVII.

Time sheet summaries indicate that during an eight-month period, Shmuel Mezan was employed by IMM from September 15, 1978, through April 14, 1979, and he accrued some 2,287 hours. Of those hours, 2,109 were performed on vessels and 178 hours were performed on land preparing equipment in IMM's yard to be used at sea. Mezan's record further indicates that his vessel-related work assignments lasted from as little as a few hours to as much as one twelve-day hitch, with an average duration of three to four days. During that time, Mezan was assigned to four different vessels as many as three times; on eight vessels twice, and once on the ten other vessels to which he was assigned during this eight-month period.

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*See Work Summaries - Appendix I

XVIII.

The work summary of Emile Bertrand, III, spanning a one-year time period, from April 7, 1978, through the date of this accident, April 4, 1979, reveals a very similar work history. Although an hourly breakdown is not provided for Mr. Bertrand, it appears that *all* of his work was vessel-related. Perhaps this is because he was the "operator" of the mooring winch aboard the vessels, and apparently, he did not volunteer for the extra hours available ashore, as did Mr. Mezan and the others.

Emile Bertrand's work summary reveals that his vessel assignments ranged from as little as one day to as much as one nineteen-day hitch, with an average duration of some five and one-half days. During this one-year period, Bertrand was assigned to twenty-five different vessels and had been assigned to four vessels twice; all others once. His summary indicates that he had had twelve vessel assignments which lasted five days or longer.

Conclusions of Law

I.

An employer, although not a shipowner, can still become liable to his employees under the admiralty law including the Jones Act, ***Mahramus v. American Export Isbrandtsen Lines, Inc.***, 475 F.2d 165 (2nd Cir. 1973), and the site of the injury does not affect recovery if one is, in fact, a seaman, ***Higginbotham v. Mobil Oil Corporation***, 545 F.2d 422 (5th Cir. 1977). However, the fact that one is doing seaman's work aboard a vessel when injured, is, by itself, not enough to vest one with seaman's status. ***Longmire v. Sea Drilling Corporation***, 610 F.2d 1342 (5th Cir. 1980).

II.

A Court may in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman under the Jones Act. Whether or not there is a reasonable evidentiary basis for submitting the issue of seaman status to the jury, the factors to be considered are set forth in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959) and reiterated in *Longmire*, at page 1346:

> "(1) [whether] there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) *or* performed a substantial part of his work on the vessel; *and* (2) [whether] the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.
>
> "Robison, 226 F.2d at 779 (emphasis added).* * *"

III.

Nor does the fact that the injury occurs prior to the actual arrival aboard a vessel mean that one has not yet become a seaman. *Porche v. Gulf Mississippi Marine Corporation*, 390 F.Supp. 624 (E.D.La. 1975).

IV.

When transportation to and from work aboard a vessel is supplied by the employer in the employer's interests, the employee is engaged in the course of his employment during the period of transportation. *Vincent v. Harvey Well Service*, 441 F.2d 146 (5th Cir. 1971).

V.

The word "permanent" has never been given a literal interpretation under the Jones Act, *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 327 (5th Cir. 1977), and a worker need not be connected with one vessel in order to meet the requirements necessary for Jones Act status since a seaman may be a member of a crew of numerous vessels. *Brannif v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), and a person will not be deprived of his Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time. *Porche*, supra, at page 631.

VI.

"Nevertheless, the broad parameters of definition must be established if the terms are to have content." *Powers v. Bethlehem Steel Corporation*, 477 F.2d 643 (1st Cir. 1973). If what emerges from facts and inferences taken most favorably to the plaintiff cannot establish a "more or less permanent connection with the vessel or with a specific group of vessels", a jury may not make it one. At times, the Court uses the words "fleet of vessels". At other times, it uses the words "group of vessels", and still other times, "specific vessels". Regardless of which phrase the Court uses, to be a member of a crew of numerous vessels would require that the

group or fleet act together under one control or gather closely together and form a recognizable unit. Therefore, it would appear that one cannot be a member of a crew of numerous vessels which have no common ownership or control.

VII.

The leading cases that are generally cited to support seamen's status in situations such as this, are *Ardoin v. J. Ray McDermott & Company*, 641 F.2d 277 (5th Cir. 1981); *Davis v. Hill*, supra; *Landry v. Amoco Production Company*, 595 F.2d 1070 (5th Cir. 1979); *Porche v. Gulf Mississippi*, supra; *Brannif v. Jackson Ave.-Gretna Ferry, Inc.*, supra; *Taylor v. Packer Diving and Salvage Company*, 342 F.Supp. 365 (E.D.La. 1971), aff'd., 457 F.2d 512. In all of these cases, there was evidence from which a reasonable person could conclude that there was a relationship between the claimant and a specific vessel or identifiable group of vessels.

In *Ardoin*, there was evidence that the plaintiff, a structural welder, could have been permanently assigned to a fleet of a half dozen derrick barges owned by his employer, McDermott. The nature of Ardoin's employment was such that he never worked except in conjunction with one of these barges. In *Davis*, there was evidence that a welder's helper could have had a permanent connection with the derrick barge, W-701, chartered by his employer. In *Landry*, the plaintiff worked on her employer's barges and was injured when she jumped from one to another. In *Porche*, the decedent was replacing a man who was a member of the crew of the RB-2, and lost his life on a crew boat prior to its arrival at the vessel. In *Brannif v. Jackson Ave.-Gretna*, it was a regular part of decedent's duties to board each of his employer's several ferries every morning to determine if any

repairs or maintenance work was needed. The Court reversed a summary judgment entered by the trial judge for defendant and stated it would not offend the permanency requirement of Robison if the decedent was assigned to several "*specific*" vessels or performed a substantial part of his work on the several "*specified*" vessels.

In *Taylor*, the plaintiff was assigned by his employer to a pipe-burying barge owned by Aquatic Marine for three months and then for approximately two months to the barge, Paker I, which his employer had leased for its own work, and then to a jack-up barge leased by his employer from Arthur Levy for underwater welding work on which the plaintiff spent an entire working month. The Court found that the plaintiff, injured while temporarily assigned to a land job, was a seaman. However, in *Taylor*, there was a group of specified vessels on which the plaintiff performed substantially all of his work.

In *Culver v. Slater Boat Company*, 644 F.2d 460 (5th Cir. 1981), the opinion indicates that the widow and children of a seaman of an anchor-pulling crew sued and recovered under the Jones Act. However, the issue of the decedent's status was evidently conceded and no determination was made by the jury in the trial court.*

In *Magnolia Towing Company v. Pace*, 378 F.2d 12 (5th Cir. 1967), the plaintiff who worked as a pilot for the defendant tugboat owner was at home off duty in Baton Rouge, when he was called to Vicksburg, where he was to board a tugboat as a pilot. Enroute to Vicksburg, he was injured in an automobile accident. The Court found that he was a seaman, noting that he was permanently assigned to one or

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***See copy of interrogatories attached - Appendix II**

another of the defendant's tugboats and any uncertainty as to which one was not material.

VIII.

In *Rotolo v. Halliburton Company*, 317 F.2d 9, 13 (5th Cir. 1963), decedent was found not to be a seamen when, at no time, was he permanently assigned to or connected with a specified boat, or two or more specified boats and did not do a substantial part of his work on a specified boat or two or more specified boats.

Often cited (but not controlling),to defeat the permanency requirement of Robison is the New York State case of *Lotzman v. Oxyness Shipping Co., Inc.*, 402 N.Y.S.2d 964, 1978 Am. Mar. Cas. 1248 (1978), where the Court found that a compass adjuster who performed all of his work aboard vessels was not a Jones Act seaman due to the lack of any permanent connection with a vessel.

In the recent decision of *Aparicio v. Swan Lake*, 643 F.2d 1109, (5th Cir. 1981), the Court held that line handlers, injured while engaged in the classical seaman's work of handling the lines of a vessel on a regular basis do not qualify as "true seamen" since they are not more or less permanently assigned to a particular vessel or specific fleet of vessels, but instead, perform duties aboard any vessel that happens to be navigating the Panama Canal.

In *Guidry v. Continental Oil Company, et al*, 640 F.2d 523 (5th Cir. 1981) the Court made it clear that the relationship between the individual and an identifiable vessel or group of vessels must be substantial in point and time, not spasmodic.

"* * * *The key is that there must be a relationship between the claimant and a specific vessel or identifiable group of vessels.*

"Guidry's deposition was quite explicit his assignment to any particular structure was random. At no time was he assigned to work on a particular rig on a continuous or regular basis. *See, e.g., Stokes v. B. T. Oilfield Services, Inc.*, 617 F.2d 1205, 1207 (5th Cir. 1980); *Keener v. Transworld Drilling Co.*, 468 F.2d 729, 732 (5th Cir. 1972). Indeed, of the forty different rigs Guidry was assigned to during his career, thirteen were non-vessel fixed platforms, seven were on land, and of the remaining twenty movable rigs he was on thirteen only once and never did he return to a specific rig more than three times." (Emphasis added)

Although this anchor-handling crew was continuously subjected to the perils of the sea like blue water seamen and was engaged in classical seaman's work, the Court finds as a matter of law that there is no reasonable evidentiary basis to support a jury finding that the injured party and the decedents involved herein were permanently assigned to any specific vessel or group of vessels and therefore, they were not seamen under the Jones Act. The Motions for Summary Judgment by the defendants are GRANTED.

Opelousas, Louisiana, July 15, 1981.

/s/John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX I

WORK SUMMARIES

	Vessel	SHMUEL MEZAN Period Covered: 9/15/78-4/14/79 Number of Assignments to Vessel	SHMUEL MEZAN Total Duration In Days	EMILE BERTRAND, III Period Covered: 4/7/78-4/4/79 Number of Assignments to Vessel	EMILE BERTRAND, III Total Duration In Days
1.	Inmar Prince	2	4		
2.	Inmar Count			1	3
3.	Cozumel Island	2	2-1/2		
4.	Breton Island	1	1		
5.	Padre Island			1	6
6.	Banda Seahorse	2	2	1	5
7.	Atlantic Seahorse	1	12	2	6
8.	Star Light	1	1-1/2		
9.	Morning Light	2	3-1/2	1	6

WORK SUMMARIES

	Vessel	SHMUEL MEZAN Period Covered: 9/15/78-4/14/79 Number of Assignments to Vessel	SHMUEL MEZAN Period Covered: 9/15/78-4/14/79 Total Duration In Days	EMILE BERTRAND, III Period Covered: 4/7/78-4/4/79 Number of Assignments to Vessel	EMILE BERTRAND, III Period Covered: 4/7/78-4/4/79 Total Duration In Days
10.	Northern Light	3	5	2	10
11.	Cpt. Francois LeClerc	3	9		
12.	Calico Jack	3	6-1/2	1	5
13.	M/V L'Olonnois	2	4-1/2	1	1
14.	Gulf Fleet 14			1	4
15.	Gulf Fleet 15			1	3
16.	Gulf Fleet 23	2	6		
17.	Gulf Fleet 26	2	9		
18.	Aquamarine 301	1	3	1	3
19.	Aquamarine 501			1	4
20.	Aquamarine 503	1	8	1	8

WORK SUMMARIES

Vessel	SHMUEL MEZAN Period Covered: 9/15/78-4/14/79		EMILE BERTRAND, III Period Covered: 4/7/78-4/4/79	
	Number of Assignments to Vessel	Total Duration In Days	Number of Assignments to Vessel	Total Duration In Days
21. Aquamarine 504	1	4	2	6
22. M/V Independence	1	4	1	3
23. Freedom Service			1	9
24. Liberty Service			1	4
25. Ocean King			1	4
26. Ocean Marlin			1	5
27. Ocean Tarpon			1	11
28. M/V Salem	1	2	1	2-1/2
29. State Brigade	2	6		
30. State Command			1	4

WORK SUMMARIES

Vessel	SHMUEL MEZAN Period Covered: 9/15/78-4/14/79 Number of Assignments to Vessel	SHMUEL MEZAN Period Covered: 9/15/78-4/14/79 Total Duration In Days	EMILE BERTRAND, III Period Covered: 4/7/78-4/4/79 Number of Assignments to Vessel	EMILE BERTRAND, III Period Covered: 4/7/78-4/4/79 Total Duration In Days
31. M/V Bering Seal	3	7-1/2		
32. Rhonda Martin	1	4	1	2-1/2
33. Ann Bonney	1	2	2	8
34. Resolute			1	19

APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION No. 76-1377
SECTION "A"

RUTH CULVER, ETC., ET AL
VS.
SLATER BOAT COMPANY, ET AL

JURY INTERROGATORY FORM

1. Was defendant Gulf Overseas Marine Corporation or Gulf Overseas Service Corporation negligent in a manner that was a cause of the injury and death of Mr. Curtis Culver?

Yes (x) No
Go to Question #2.

2. Was defendant EuroPirates International, Inc. negligent in a manner that was a proximate cause of the injury and death of Mr. Curtis Culver?

Yes(x) No
Go to Question #3.

3. Was defendant Ocean Drilling and Exploration Company or ODECO, Inc. negligent in a manner that was a proximate cause of the injury and death of Mr. Curtis Culver?

Yes(x) No
Go to Question #4.

4. Was the vessel BLACK BART unseaworthy in a manner that was a proximate cause of the injury and death of Mr. Curtis Culver?

Yes(x) No

If your answer to either #1 or #2 or #3 or #4 or any combination of them was "Yes," go to Question #5. If your answers to #1 and #2 and #3 and #4 were *all* "No," stop, skip the remaining questions on this form and return to the Courtroom with your verdict.

5. Was Mr. Curtis Culver negligent in a manner which contributed to causing his own injury and death?

Yes No(x)

If your answer to #5 was "Yes," go to Question #6. If your answer to #5 was "No," go to Question #7 and skip #6.

6. If your answer to #5 was "Yes," then to what extent did Mr. Culver's own negligence contribute to his injury? (Any answer to this question should be expressed in the form of a percentage.)

_____ %

Go to Question #7.

7. Fill in the amounts beside the statements below which will fairly and adequately compensate Mrs. Culver and her children for their damages. In the event that, as to any one or more of the following items, you should find that plaintiff is not entitled to damages, you should not fill in such blank, but skip it, and go on to the next one.

A. The amount, if any, due to Mrs. Culver and her children for loss of support from

May 9, 1975, the date of the accident, until the present date?

$71,062.00

b. The amount, if any, Mrs. Culver and/or her children will lose in support from Mr. Culver each calendar year after the date of this trial as the result of his death?

$13,363.20 per year.

c. The number of years, if any, Mrs. Culver and/or her children will sustain the yearly loss of support that you have listed in part (b) of this question. Indicate the total number of years in the space.

31 years

d. The amount, if any, Mrs. Culver is due for loss of her husband's household services?

$1,500

e. The amount, if any, the Culver children will lose as the result of the loss of their father's guidance, training, and nurture while they are minors; the children's names and ages at the time of Mr. Culver's death follow. Any answer to this question must indicate a figure as to each child.

Benny (13)	$5,000
Tonia (9)	$5,000
Rodney Wayne (7)	$6,000
Bridgett (2½ Mos.)	$8,000

f. If you made any award to plaintiffs for loss of support and/or services in the future (parts b, c, and d of this question), what discount percentage rate do you find to be applicable in order to reduce the award for future loss of support and/or services to their present value. (Your answer to this question should be in the form of a percentage.)

25%

New Orleans, Louisiana, this 28 day of September, 1979.

/s/ Julius Lee
FOREPERSON

NO. 83-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL MOORING & MARINE, INC., ET AL
Petitioners

versus

DEBORAH M. BERTRAND, ET AL
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR CERTIORARI

OF COUNSEL:

David W. Robertson
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QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the seaman status of workers who were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work"[1] presented a question of fact for the jury.

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1 *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243, 245 (5th Cir., 1983), quoting the district court decision, 517 F.Supp. 342, 348 (W.D. La. 1981).

LIST OF PARTIES

The following are the parties to this proceeding in the United States Court of Appeals for the Fifth Circuit:

Deborah M. Bertrand, personal representative of Emile Bertrand, III, Plaintiff-appellant

Lisa A. Bertrand, personal representative of Paul Anthony Bertrand, Plaintiff-appellant

Marilyn Emery Smith and Lawrence Emery, surviving parents of William D. Emery, Plaintiffs-appellants

Shmuel Mezan, Plaintiff-appellant

Fidelity & Casualty Company, Defendant-appellant

International Mooring & Marine, Inc., Defendant-appellee

American General Insurance Company, Defendant-appellee

Arkwright-Boston Manufacturers Mutual Insurance Company, Defendant-appellee

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NO. 83-527

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

INTERNATIONAL MOORING & MARINE, INC., ET AL
Petitioners

versus

DEBORAH M. BERTRAND, ET AL
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Deborah M. Bertrand, et al, respectfully request that the Court deny the petition for certiorari seeking review of the Fifth Circuit Court of Appeals' decision in this case.

STATEMENT OF THE CASE

This litigation arose from a traffic accident that killed three marine workers and seriously injured a fourth.[2] These workers were members of an anchorhandling crew employed by petitioner-defendant International Mooring & Marine, Inc. (IMM). They were returning home from a one-week voyage aboard a specially equipped vessel handling the anchors of a drilling barge being relocated offshore. Four separate seamen's suits, instituted in the United States District Court for the Western District of Louisiana, were consolidated for trial. All plaintiffs moved for summary judgment that they were in the course and scope of their employment as seamen at the time of their injuries. Defendants (IMM and its insurers) filed cross motions for summary judgment, contending that, as a matter of law, plaintiffs were not seamen.

The district court concluded that plaintiffs were in the course and scope of their employment when injured,[3] a conclusion not at issue here.[4] It made findings of fact that plaintiffs' work as anchorhandlers for IMM (a company specializing in the anchoring and mooring of offshore drilling barges and tender vessels)[5] took plaintiffs to sea aboard specially equipped vessels for 90% of their working time (with the other 10% being spent readying equipment for the

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2 The surviving worker and the deceased workers are collectively called "plaintiffs" in this brief.

3 517 F.Supp. at 344.

4 700 F.2d at 243, n. 5.

5 517 F.Supp. at 344.

offshore voyages);[6] that plaintiffs went to sea on these specially equipped vessels for the duration of the vessels' voyages or missions, working, living, eating, and sleeping aboard until the mission of the vessel was conpleted;[7] and that plaintiffs were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work."[8] Despite these findings, the district court denied plaintiffs' motions for summary judgment on seaman status and granted defendants' motions, reasoning that the law of the Fifth Circuit required that a seaman not assigned to a single vessel be assigned to a group of vessels "under common ownership or control."[9]

Reversing and remanding for trial on the issue of seaman status, the Fifth Circuit Court of Appeals held that, while common ownership or control of the vessels to which a worker is assigned is sometimes a factor supporting seaman status,[10] it is not required for workers who continuously go to sea,[11] perform actual navigational duties,[12] and remain with the vessel for the duration of its voyage or mission.[13] Noting that the employer's contractual arrangements with its customers, not the nature of plaintiffs' work,

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6 517 F.Supp. at 344.

7 517 F.Supp. at 344.

8 517 F.Supp. at 348.

9 517 F.Supp. at 347.

10 700 F.2d at 244 - 45.

11 700 F.2d at 245, 247.

12 700 F.2d at 247.

13 700 F.2d at 248.

had determined that the vessels on which plaintiffs worked would not be under "common ownership or control,"[14] the Court held that "[i]n light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."[15]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION.

The criteria used by the court below for determining seaman status clearly distinguish seamen, including the plaintiffs, from longshoremen and other harbor workers. If plaintiffs' employer had owned a vessel or group of vessels for plaintiffs to use in performing their anchorhandling duties, there would be no question about seaman status. Plaintiffs went to sea with these specially equipped vessels, and remained aboard them, working, eating, and sleeping there, for the entire duration of the vessel's mission. They were seamen who took short voyages into the ocean in order to perform the specific navigational task of moving floatable offshore drilling rigs, barges, and tender vessels. They were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work."[16]

The only problematic feature of the case is one brought

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14 700 F.2d at 245.

15 700 F.2d at 245, 248.

16 700 F.2d at 243, 245, quoting district court decision at 517 F.Supp. 348.

about by the employer: the vessels from which plaintiffs performed their navigational work were not owned by the employer, but were furnished by the customer (the operator of the drilling barge to be relocated) or were chartered by the employer for the specific job. As pointed out by the Court of Appeals, this was the employer's choice, not something dictated by the nature of plaintiffs' work.[17] It would be poor policy to permit these contractual and consensual arrangements between the employer and third persons to defeat Jones Act seaman status for defendant's employees. As stated by the Court of Appeals:

> "In light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."[18]

> "[E]mployers cannot prevent seamen from recovering under the Jones Act by assigning them to different vessels or by making arrangements with third parties concerning the operation or navigation of the vessels upon which they serve."[19]

In reaching its decision that plaintiffs are entitled to trial on the issue of seaman status, the Court of Appeals relied on the following criteria, all well supported by circuit court jurisprudence. (1) Summary judgment or directed verdict on seaman status is rarely appropriate, because it is ordinarily a

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17 700 F.2d at 245.

18 700 F.2d at 245.

19 700 F.2d at 248.

question of fact for the jury.[20] (2) A worker assigned to a group of vessels, performing seaman's work thereon, can be as much a seaman as is a worker assigned to a single vessel.[21] (3) Certainly the employer cannot be permitted to defeat seaman status for its employees by the simple expedient of contracting for them to perform their seaman's work aboard a group of vessels chartered or borrowed by it.[22] (4) Plaintiffs were "regularly and continuously assigned to vessel-related activity. * * * [P]laintiffs' entire employment involved preparing to work or working from a vessel."[23] (5) Plaintiffs' duties were "truly navigational".[24] (6) "]P[laintiffs' tour of duty with a vessel was for the duration of the vessel's mission. * * * [T]he mission of the vessel and the plaintiffs' job were coextensive; when plaintiffs finished their responsibilities, the vessel's mission was completed."[25]

No court could have difficulty with the question of seaman status for a longshoreman, who happens to go aboard many vessels to perform his work, because of the instant decision of the Court of Appeals. Plaintiffs in this case are men who went to sea aboard, and do virtually all of their work from, vessels especially equipped and furnished to plaintiffs for the task of moving the anchors of and thereby assisting in the movement of the specialized vessels used

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20 700 F.2d at 244.

21 700 F.2d at 244 - 46.

22 700 F.2d at 245, 248.

23 700 F.2d at 247.

24 700 F.2d at 247.

25 700 F.2d at 248.

in drilling for oil and gas offshore. This is navigational work by any sensible definition of navigation. No longshoreman or harbor worker does anything like that. Furthermore, plaintiffs' involvement with each vessel was for the entire duration of each vessel's mission or voyage; no longshoreman or harbor worker is similarly situated with respect to any vessel or group of vessels.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S SEAMAN STATUS DECISIONS

The Petition for Certiorari creates the impression that the Court of Appeals in this case applied some brand-new test for determining seaman status. In fact, the decision below is an unremarkable application of the seaman status criteria established by the Fifth Circuit's leading seaman status decision, *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir., 1959). In that case, the Fifth Circuit Court painstakingly analyzed this Court's seaman status decisions, including *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), the only case cited by the Petition in support of its assertion that the decision below conflicts with this Court's law of seaman status. Particularly noting the modification of *Bassett* that occurred in this Court's subsequent decision in *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957),[26] the Fifth Circuit concluded that synthesis of this Court's status decisions yielded the following criteria:

> "[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was

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26 *Offshore Company v. Robison*, 266 F.2d 769, 776 - 77 (5th Cir., 1959).

> assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips."
> 266 F.2d at 779.

In the present case, the Court of Appeals concluded that plaintiffs satisfied both *Robison* criteria. (1) The "permanent assignment" prong of the first criterion was satisfied by the fact that plaintiffs, who actually went to sea and ate and slept aboard the vessels, remained with each vessel for a tour of duty that was coextensive with the duration of the vessel's mission.[27] The Court stated that the permanent assignment criterion is "meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for a relatively short period of time."[28] (2) The second *Robison* criterion was satisfied because plaintiffs' duties "clearly contributed to the accomplishment of the vessel's mission, the relocation of the drilling barge."[29]

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27 700 F.2d at 247 - 48.

28 700 F.2d at 247.

29 700 F.2d at 246.

This Court's seaman status decisions fully support the Fifth Circuit's *Robison* test and its application in the present case. *South Chicago Coal & Dock Co. v. Bassett, supra,* the only Supreme Court case relied upon by the Petition, is the earliest of four decisions by this Court involving the criteria for determining when a worker is a seaman. It is the only one of the four in which this Court concluded that the worker might be found not to be a seaman, and the context in which that conclusion was reached is wholly unlike the present case. The *Bassett* claimant sought Longshoremen's Act benefits, not seaman's rights. The Deputy Commissioner, charged under the Longshoremen's Act as it then read with the responsibility of fact-finding and interpretation, had found that claimant was entitled to benefits, despite the argument that he was excluded from coverage as a "member of a crew of [a] vessel." In upholding the Deputy Commissioner's conclusion as a reasonable interpretation of the facts, this Court stressed that it was not interpreting the Jones Act or any other statute, but only the Longshoremen's Act:

> "Recently, in considering the application of the Jones Act to 'any seaman,' we adverted to the 'range of variation' in the use of the word 'crew,' and it was. . . emphasized that what concerned us in that case . . . was 'not the scope of the class of seamen at other times and in other contexts.' We said that our concern there was 'to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.' [Citation.] That is our concern here in construing this particular statute- - the Longshoremen's and Harbor Workers' Compensation Act - - with appropriate regard to its distinctive aim. We find little aid in considering the use of the term 'crew' in other statutes

having other purposes."
309 U.S. at 259-60.

Bassett is thus not in point: Affirming Longshoremen's Act coverage on the view that a reasonable fact-finder could conclude that claimant was not a member of a crew of a vessel is not authority for denying Jones Act coverage in the present case. In addition, the facts of the *Bassett* claimant's work were wholly different from plaintiffs' duties. The *Bassett* claimant was not engaged in classical seaman's work and was not subjected to seaman's dangers. The Petition for Certiorari itself (pp. 10-11) states the facts of *Bassett* in such a way as to reveal that *Bassett* was principally a harbor worker, who did very little if any of the kind of work traditionally associated with the movement of vessels.

Furthermore, *Bassett* was significantly modified by this Court's subsequent seaman status decisions. In *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), plaintiff was a handyman for an anchored dredge, injured in a shed ashore. He worked an eight-hour day and went home at night. The dredge never moved during plaintiff's entire period of employment. Plaintiff had no navigational duties of any kind. Upholding a jury verdict that plaintiff was a Jones Act seaman and reversing a state court of appeals decision to the contrary, this Court stated:

> "[W]e believe. . . . that our decision in *South Chicago Co. v. Bassett* . . . . has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final

> if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.
>
> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew."
> 352 U.S. at 374.

There is nothing in the *Bassett* decision that calls into question any aspect of the decision below. Furthermore, the decision below is fully supported by the later *Senko* decision.[30] Hence, the Petition for Certiorari is mistaken in asserting that the decision below conflicts with this Court's seaman status decisions.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE THIRD CIRCUIT'S SIMKO DECISION

The Petition claims that the decision below conflicts with *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3rd Cir., 1979). The *Simko* plaintiff was a barge cleaner, who was never involved in the handling or maneuvering of any barge, and whose entire work was cleaning barges that never moved

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30 The *Senko* approach, that a Jones Act Jury case is presented if reasonable persons could find plaintiff had actual or potential significant navigational duties, was reaffirmed in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 253 (1958); See also *Gianfala v. Texas Co.*, 350 U.S. 879 (1955).

at any time plaintiff was aboard. 594 F.2d at 964. Obviously, there is no conflict presented by the facts of the two cases.

Nor is there any conflict on the language and doctrine of the two decisions. The Third Circuit's test for seaman status is stated as follows:

> "[A] maritime worker who does not actually go to sea but who is injured while performing duties on a navigable vessel must establish that he performed significant navigational functions with respect to that vessel in order to recover under the Jones Act." 594 F.2d at 965.

Plaintiffs in this case went to sea. Furthermore, they have navigational duties and performed "classical seaman's work."[31] They were "continuously subjected to the perils of the sea like blue water seamen."[32] Hence, the asserted conflict with *Simko* is illusory.

CONCLUSION

The Petition for Certiorari mischaracterizes the facts and reasoning of the Court of Appeals. It mischaracterizes this Court's *Bassett* decision, and ignores subsequent decisions of this Court clarifying the meaning of *Bassett*. It mischaracterizes the Third Circuit's *Simko* decision. As a result, the question raised by the Petition is not presented. There is no conflict between the decision below and the decisions relied upon by the Petition, and the decision below creates no

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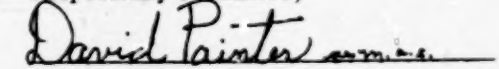
31 700 F.2d at 243, 245.

32 Id.

danger of confusing the line between longshoremen and harbor workers, on the one hand, and seamen, on the other. Under this Court's decisions, especially *Senko*, plaintiffs were entitled to a jury trial on the issue of seaman status, and the holding of the Fifth Circuit was correct. Hence, the petition for Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the bar of this Court and that three copies of the foregoing Brief in Opposition to the Petition for Certiorari have been served by depositing those copies in the United States mail, postage prepaid, addressed to the following parties at the addresses indicated:

Arkwright-Boston Manufacturers Mutual Insurance Company, through its counsel of record, Robert M. Contois, Jr., Jones Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, Louisiana 70112;

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The foregoing services were made on behalf of respondents, Deborah M. Bertrand, Lisa A. Bertrand, Marilyn Emery Smith and Lawrence Emery, Shmuel Mezan and Fidelity & Casualty Company, on December 21, 1983.

David Painter

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